Petition

81-550

No. _____

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID GUY BUTTRESS
Petitioner

v.

STATE OF OKLAHOMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

ALAN R. CARLSON
530 S.E. Delaware
Bartlesville, Okla. 74005
(918) 336-2520
Attorney for Petitioner

Cone-Lewis Printing Co. • 323 E. 3rd • Tulsa, Okla. 74120 • Phone (918) 582-1234

QUESTIONS PRESENTED

1. Whether an affiant may obtain statements from an informant under the influence of drugs while obviously intoxicated, then take those statements absent any independent corroboration or verification of the contents contained therein and use those statements to form the basis of probable cause in an affidavit for the issuance of a search warrant; and simply by naming the criminal informant, comply with the reliability requirements of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); and further whether said conduct can escape the classification of reckless disregard for the truth imposed by *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)?

2. Whether the Court's decision rendered in *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), should be withdrawn to provide to State defendants the opportunity for review of the fourth amendment claims under the Habeas Corpus Jurisdiction of the lower federal court, thereby removing some of the pressure which has been place upon this court's docket due to its status as the only remaining federal forum for review of fourth amendment claims arising from state court prosecutions?

TABLE OF CONTENTS

Page

Question Presented i

Citation to Opinion Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of Case 3

Events Leading Up To Arrest 3

Proceeding in Trial Court 4

How the Federal Questions were raised and decided below 7

Reasons for Granting the Writ 8

I: The Court should grant certiorari to clarify *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), *Anguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), thereby bringing the State of Oklahoma into compliance with the fourth amendment protections outlined within these cases by establishing that: the use of a first time criminal informant's statements, made by said informant while he is obviously under the influence of drugs in an intoxicated condition, to establish probable cause within an affidavit for search warrant, without the officer affiant first making some attempt to verify or corroborate, the informant's statements, fall clearly within the reckless disregard for the truth protection provided by the fourth amendment to the United States Constitution as established in *Franks.* 8, 9

II: The Court should grant certiorari to reconsider the limitations imposed by its decision rendered in *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), which removed the fourth amendment search and seizure questions from the habeas corpus jurisdiction of the lower federal courts thereby leaving the already crowded docket of the United States Supreme Court as the only federal forum for review of state court decisions in which the defendant asserts a claim of fourth amendment violations by the state police authorities.....21, 22

Conclusion 27

Appendix A A-1

Appendix B B-1

Appendix C C-1

AUTHORITIES CITED

Page

CASES:

Aguilar v. Texas,
378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723
(1964) .....*i*, 8, 9, 10, 11, 13, 14, 15, 17, 18, 21, 24

Bishop v. State,
Okl.Cr., 605 P.2d 260 (1979).....12, 24

Byers v. United States,
273 U.S. 28, 47 S.Ct. 248,
71 L.Ed. 520 (1927).....24

Franks v. Delaware,
438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667
(1978) .....*i*, 5, 6, 8, 9, 10, 15, 17, 18, 19, 20, 21

Gentry v. State,
Okl.Cr. 562 P.2d 1170 (1977).....12

Luker v. State of Oklahoma,
Okl.Cr., 504 P.2d 1238 (1972) 11, 15, 16, 17, 24

Mapp v. Ohio,
367 U.S. 643, 6 L.Ed.2d 1081,
81 S.Ct. 1684, (19).....23

Rochin v. California,
342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) ...19

Sibron v. New York,
392 U.S. 40, 88 S.Ct. 1889,
20 L.Ed.2d 917 (1968).....24

Spinelli v. United States,
393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637
(1969).....*i*, 8, 9, 10, 11, 14, 15, 17, 18, 21, 24

Page

Stone v. Powell,
428 U.S. 465, 96 S.Ct. 3037,
49 L.Ed.2d 1067 (1976) ..... *i*, 22, 23, 24, 25,

United States v. Burke,
409 F.Supp. 855 (S.D. Florida 1980) 9

United States v. Forese,
612 F.2d 1376 (5th Cir. 1980) 9

United States v. Schauble,
647 F.2d 113 (10th Cir. 1981) 9

United States v. Smith,
635 F.2d 1329 (8th Cir. 1980) 9

Wolf v. Colorado,
338 U.S. 25, 93 L.Ed. 1782,
65 S.Ct. 1359 (1949) 23

Wright v. State,
Okl.Cr., 552 P.2d 1157 (197) 12, 24

CONSTITUTIONAL AMENDMENTS:

The Fourth Amendment to the Constitution 2

The Fourteenth Amendment to the Constitution .. 2

STATUTES:

28 U.S.C. §1257(3) 2

28 U.S.C. §2254 ..... 3, 22

No. 81-_____

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID GUY BUTTRESS
Petitioner

v.

STATE OF OKLAHOMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

Petitioner, DAVID GUY BUTTRESS, prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

CITATION TO OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was not released for publication, but was issued on the 16th day of March, 1981 and filed of record on March 17, 1981. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on March 16, 1981. A timely Petition for Rehearing was denied on July 17, 1981. The Court of Criminal Appeals is the court of last resort for review of criminal cases in the State of Oklahoma. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.";

and the fourteenth amendment to the Constitution of the United States, which provides in relevant part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. This case also involves the following provision of the statutes of the United States:

28 U.S.C. §2254

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF CASE

Events Leading Up To arrest:

In the early evening hours of January 21, 1978, James R. Poore, Jr., a 30 year old college graduate then employed with Phillips Petroleum Company, was arrested in Bartlesville, Oklahoma. He was charged with driving a motor vehicle while under the influence of drugs and a related offense of unlawful possession of amphetamines.

Immediately following his arrest Mr. Poore was taken to the Bartlesville Police Department and questioned while obviously under the influence of drugs. This interrogation was recorded by the Bartlesville Police Department and admitted into evidence at various motion hearings and the trial of the case. The questioning resulted in the preparation by a Bartlesville policeman of an Affidavit for Search Warrant relying in toto upon the drug induced and intoxicated statements of Mr. Poore to establish probable cause for the issuance of a search warrant to search the Petitioner, DAVID BUTTRESS' house.

A warrant for the instant search was obtained in the absence of transcribed testimony at the home of a Washington County magistrate in the evening hours of

January 21, 1978. APPEAL RECORD – Transcript of Trial held on Octobert 24 and 25, 1978, before James H. Laughlin, at page 129. Defendant's residence was forthwith subjected to nighttime search. Contraband was seized and Defendant was placed under immediate arrest. A copy of the search warrant and affidavit are attached hereto in Appendix C.

Proceeding In Trial Court:

Information in case number CRF-78-16 was subsequently filed in the District Court in and for Washington County, State of Oklahoma on January 23rd, at which time, Defendant was arraigned. At arraignment Defendant demanded that a copy of the affidavit accompanying the search warrant be provided to counsel, which, after extensive argument, was at that time denied. APPEAL RECORD – Transcript of Proceedings, heard on the 23rd day of January (arraignment) and the 3rd and 12th days of May, 1978, before Chloe Passley, Special Judge of Preliminary Hearing, pages 3-54. *id.*, pages 3-54.

Defendant subsequently filed timely written motions, including Motion to Quash Search Warrant, Motion to Quash Information, Motion to Quash Arrest, and Motion to Supress Evidence. All were summarily overruled. On the 3rd and 12th days of May, 1978, Defendant proceeded on to Preliminary Hearing. In its defense Defendant called state's named informant, one James Ray Poore, Jr., citing as authority for such procedure *Franks v. Delaware* (*supra*). APPEAL RECORD (above cited) Transcript, Preliminary Hearing, page 208. State's objection to the testimony of this witness was sustained by the Court. *id.*,

at page 209. Defendant then made a pro-offer into the record concerning what this witness' testimony would be if allowed to testify. *id.*, at page 209. State objected even to Defendant's pro-offer and extensive argument was thereupon held. *id.*, at pages 208-221. Defendant then argued its Motions to Quash Arrest and Motions to Suppress Evidence on the grounds the warrant did not meet statutory requirements. *id.*, at pages 221-230. Again, motions were summarily overruled and Defendant was ordered bound over for district court trial. *id.*, at page 231-232.

Defendant's motions were then re-urged at the pretrial district court level, whereon Defendant requested an evidentiary hearing on the same. Hearing was held on October 11, 1978, before Associate District Judge, James Laughlin. Again, *Franks v. Delaware* (*supra*) was specifically argued by Defendant. APPEAL RECORD–Transcript of Defense Motion Hearing, held before the Honorable James Laughlin on October 11, 1978, at pages 3-9.

In accordance with the *Franks* (*supra*) decision, Defendant again called to testify state's informant named in the instant search warrant affidavit. At this hearing Informant Poore was allowed to testify. *Testimony of this witness established that all material allegations in the warrant affidavit attributed to him were false. id.*, at pages 10-21. Moreover, informant testified that *at the time of the taking of this information, he was in a severe state of drug intoxication. id.*, at pages 12-14. Defendant also called at this hearing informant's ex-spouse, one Jean Ann

Poore, who corroborated the informant's testimony, and further stated that when the informant was in such a drug induced state it was very obvious to other persons. *id.*, at pages 31-56. Defendant's subsequent arguments at this hearing under *Franks v. Delaware* (*supra*) were overruled. *id.*, at page 57. Defendant's additional arguments concerning State's failure to observe statutes when executing the instant warrant were likewise considered and rejected. *id.*, at page 58.

Defendant then proceeded to jury trial on the 24th day of October, 1978. Midway through in the two day proceedings, prosecution and defense stipulated to waive jury. APPEAL RECORD–Transcript of Trial, held before the Honorable James H. Laughlin on October 24 and 25, 1978, at page 66. Defendant's Motions to Quash and Motions to Suppress were urged throughout. *id.*, at pages 39, 148, 152, 163, 169, 179. In all instances, such were overruled. By stipulation, Informant Poore's testimony and corroborating testimony of his former wife were admitted into the trial record. *id.*, at pages 148, 150. Defendant was convicted as a first-time offender under 63 O.S. 1971 §402B. *id.*, at page 179-80. Defendant waived delayed judgment and was then sentenced on the 25th day of October, 1978, to serve a term of four years in custody of the Department of Corrections, providing that two years of such sentence were to be suspended. *id.*, at page 180. Defendant's Motion for Judgment Notwithstanding Verdict, or, in the alternative, Motion for New Trial was timely, filed, argued, and denied. Defendant's appeal was then timely filed in the Oklahoma Court of Criminal Ap-

peals. Copies of the complete record in the trial court and appellant court are being prepared for filing with this Petition for Writ of Certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The questions were presented at the trial court in the manner outlined by the Statement Of Case.

2. In Petitioner's second assignment of error on the appeal to the Oklahoma Court of Criminal Appeals, Petitioner asserted that there was error of the trial court in overruling the Defendant's Motion to Quash the Arrest and Motion to Suppress the Evidence, which error was reurged by Defendant at the time of trial. Further, at Petitioner's fifth assignment of error that there was error of the court in allowing the state's witnesses to testify over Defendant's objections as to the evidence which was obtained pursuant to the search warrant. And further, at Petitioner's sixth assignment of error it was urged that there was error of the trial court in admitting the marijuana into evidence over the Defendant's objections. And further, as assignment of error number eight, there was urged error of the trial court in overruling the Defendant's Motion to Suppress, the Motion to Quash the Arrest and admitting evidence obtained as a result of the search at 1905 South Santa Fe over the Defendant's objection. Further, at Defendant's assignment of error number ten, it is urged that there were errors of law occurring at the trial and duly objected to by the Defendant. Further, as assignment of error number seventeen Petitioner urged that the

trial court erred in its rulings on the admissibility of evidence as shown by the objections taken at the time of trial. And finally, as assignment of error number eighteen, Petitioner urged that the court erred in failing to protect the statutory and constitutional rights of the Defendant and to give him a fair and impartial trial as guaranteed by the Constitution of the United States and the Constitution of the State of Oklahoma.

In his Petition for Rehearing and Support Brief, Petitioner realleged all the preceding questions raised in the Petition of Error. All Federal Questions now raised by Petitioner in this Petition For Writ of Certiorari clearly fall within the allegations of error as set out above.

REASONS FOR GRANTING THE WRIT

I

The Court should grant certiorari to clarify *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584,21 L.Ed.2d 637 (1969), thereby bringing the State of Oklahoma into compliance with the fourth amendment protections outlined within these cases by establishing that: the use of a first time criminal informant's statements, made by said informant while he is obviously under the influence of drugs in an intoxicated condition, to establish probable cause within an affidavit for search warrant, without the officer affiant first making some attempt to verify or cor-

roborate, the informant's statements, fall clearly within the reckless disregard for the truth protection provided by the fourth amendment to the United States Constitution as established in *Franks*.

A review of the lower court case law handed down since *Franks v. Delaware*, rendered by this court, reveals numerous cases in which defendants have attempted to mount subfacial attacks upon an affidavit for search warrant but have failed to meet the requirements established by this court in *Franks v. Delaware*. Various courts in construing the provision of *Franks* have discussed in conjunction therewith the provisions of *Anguilar v. Texas* and *Spinelli v. United States*. See *United States v. Schauble*, 647 F.2d 113 (10th Cir. 1981), *United States v. Forese*, 612 F.2d 1376 (5th Cir. 1980), *United States v. Smith*, 635 F.2d 1329 (8th Cir. 1980) and *United States v. Burke*, 409 F.Supp. 855 (S.D. Florida 1980). Upon review of *Aguilar*, *Spinelli*, and *Franks*, it becomes clear that they should be considered closely allied when examining the fourth amendment rights established by the United States Constitution.

This petition raises a question of whether a police officer may totally disregard the situation under which certain statements or information were obtained from a first time criminal informant, and make no effort to verify through independent sources or independent investigation any of the information obtained fom this criminal informant before placing the statements of the informant upon an affidavit for search warrant. Simply because the name of the criminal informant is disclosed upon the affidavit

for search warrant, or when stated in terms applicable to the facts of the case presented in this petition, may an officer take a statement from an individual with whom he is previously unacquainted while said individual is charged with a criminal offense and is under the influence of drugs or highly intoxicated; and then make no effort through individual investigation to corroborate any of the statements made by this criminal informant, may this officer then use these uncorroborated, untested statements within an affidavit for search warrant and, under *Franks v. Delaware,* not be said to be acting in reckless disregard of the truth in violation of the fourth amendment.

This Court, by way of *Aguilar v. Texas* and *Spinelli v. United States* has defined and outlined the requirements which must be established before an informant's statements may be used in an affidavit for search warrant as the basis for probable cause for the issuance of a search warrant. The outcome of these two cases gives a two prong consideration for the use of an informant's statements, those being as follows:

> "The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were." *Aguilar,* at page 114.

And it concluded with the second factor being:

> "Some of the underlying circumstances from which the officers concluded that the informant . . . was credible or his information reliable." id., *Aguilar,* at page 114.

An examination of the affidavit for search warrant quick-

ly reveals that the two prong test of *Aguilar* and *Spinelli* has not been met. Nothing is provided within the affidavit to indicate why the officer affiant, Officer James R. Winn, believes the informant, one James R. Poore, Jr., to be reliable. The affidavit simply details certain statements which are alleged to have been made by Mr. Poore and gives the magistrate no information on which he could determine that there was reason to believe that the information provided by James R. Poore was reliable and trustworthy. This in itself, under the prior Supreme Court decisions of *Aguilar* and *Spinelli,* is sufficient basis to quash the search warrant and suppress the evidence obtained by way of said search warrant in the case at bar. However, the State of Oklahoma has since the year 1972 provided by case law that the requirements of a showing of reliability imposed by *Aguilar* and *Spinelli* are only applicable to affidavits for search warrants involving unnamed informants. *Luker v. State of Oklahoma,* Okl. Cr., 504 P.2d 1238 (1972). In *Luker* the Oklahoma Court of Criminal Appeals held:

> "In substance the affidavit alleges that the affiant officer was informed by an individual named James Sipes, that Sipes and others had burglarized a medical physicians office and had taken therefrom certain narcotic drugs. Sipes informed the affiant officer that he had delivered some of these narcotic drugs to a particular office to a man identified to him as Dr. Luker. The cases relied upon by the defendant are primarily concerned with situations where a search warrant is sought pursuant to nothing more than an undisclosed informant's tip.

> The affidavit for search warrant in the instant case was not based on a tip of an undisclosed informant but rather on a specified factual information given by a named and known informant. Thus, there is no problem as there was in *Spinelli v. United States,* and *Aguilar v. Texas* where it is necessary that the affidavit set forth details to indicate the undisclosed informant as reliable and his information credible." *id.,* at

This original decision of the Oklahoma Court of Criminal Apeals has been further defined by the Court of Criminal Appeals to hold that the mere naming of an informant within an affidavit for search warrant is sufficient to establish credibility without the requiring of any additional information regarding the credibility of such named informant. See *Gentry v. State,* Okl.Cr. 562 P.2d 1170 (1977) and *Wright v. State,* Okl.Cr., 552 P.2d 1157 (197). The later Oklahoma Court of Criminal Appeals decision of *Bishop v. State,* Okl.Cr., 605 P.2d 260 (1979) provides:

> "Finally, it was not necessary for the affidavits to give detailed infoirmation pertaining to the reliability of the informants, because they were named. The situation here presented is similar to that presented in Luker v. State, Okl.Cr., 504 P.2d 1238 (1973), and, in accordance with the views expressed therein, we find this contention to be without merit. It is with undisclosed informants that some indicia of reliability are required. Luker v. State, Okl.Cr., 504 P.2d 1238 (1973)." *Bishop,* at 263.

The artificial distinction drawn by the Oklahoma court has no basis in the decisions rendered by this court.

The specific language of *Aguilar v. Texas*, (*supra*) provides:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones vs. United States, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, *and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was 'credible' or his information 'reliable'* otherwise 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' Giordenello v. United States, supra at 486; Johnson v. United States, supra, at 14, or, as in this case, by an unidentified informant." *id.*, at 114. (emphasis added)

The language of the Supreme Court, as quoted above, clearly establishes that this test to be applied to any informants, whether their identity is disclosed or confidential. The key, as this court has clearly established is that the inferences from the facts which lead to the complaint be drawn by a neutral and detached magistrate and not as the State of Okahoma has indicated as to whether an informant is named or unnamed. The danger of the reliability or unreliability of an informant is not lessened one iota by the fact that his name is placed within the affidavit for

search warrant. This court in *Spinelli v. United States, supra,* simply construed certain of its provisions set out in *Aguilar* by providing that the reliability of an informant may be established through partial corroboration of the informant's statements, but only where that corroboration is of pertinent or material elements and not simply collateral unimportant details. This court in *Spinelli* uses for example, the detail provided by the informant in *Draper v. United States* in which the informant was able to describe the train that the defendant would be arriving on, exactly what he would be wearing and what he would be carrying. The officers in *Draper* were then able to verify in every aspect the train that the defendant arrived on, the clothes that he would be wearing, everything except the fact that he would be carrying three ounces of heroin. Based upon this, the Court ruled when discussing *Draper:*

> "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way . . . The police upon meeting the inbound train on the second morning specified by informer, Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of hole-cloth; since the report was a sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause has been established." *id.,* at 417.

On examination of the affidavit presented in the case before the court on this Petition For Writ of Certiorari it

becomes clear that there is no corroboration of any of the criminal informant's information, there is not even an attempt by the officers to determine whether or not a DAVID BUTTRESS resided at the address in question, there is not even a mere checking of the phone book to determine if DAVID BUTTRESS is listed at such address. In short, there is no basis under *Aguilar* or *Spinelli* by which a magistrate could find that the reliability of the criminal informant had been established sufficiently to sustain a finding of probable cause for issuance of a search warrant.

The result of the holding of the Oklahoma Court of Criminal Appeals which follow *Luker* has been the sanctioning by the Oklahoma Judicial System of not only reckless disregard to the credibility of named criminal informants by the police officials of the State of Oklahoma, but have further sanctioned total disregard for the need to verify the truthfulness of statements of named criminal informants. This has resulted from the fact that the highest court of the State of Oklahoma has spoken on numerous occasions clearly establishing that in Oklahoma the credibility of a named criminal informant on an affidavit for search warrant is never subject to attack.

It is easy to understand, when viewed against their prior application of *Aguilar* and *Spinelli*, why the Oklahoma Court of Criminal Appeals would have such a difficult time in applying the *Franks* decision to the facts before the court in the present case. The briefing of this case was completed and submitted for ruling on November 2, 1979, with the court opinion being finally issued on

March 16, 1981. It would be difficult, if not impossible, for the Oklahoma Court of Criminal Appeals to develop a rational basis for determining that the officers had acted in reckless disregard for the truth when there is no requirement under the *Luker* line of cases that an officer present any factual information to a magistrate regarding the credibility or reliability of a named criminal informant. If no requirement has been mandated from the Oklahoma court decisions that such information be provided to the magistrate, how can that same Oklahoma court then determine that an officer acted in a reckless disregard to the truth by not providing such information; or by not inquiring into the credibiliity or veracity of the highly intoxicated, irrational, drugged criminal informant? How can the Oklahoma court find reckless disregard in an officer who has followed the constitutionally violative guidelines established by its own court decisions?

Taking the above background regarding the status of the law in Oklahoma relative to named criminal informants, together with the facts of the present case involving a named criminal informant who was in a drug induced stupor for a period of approximately three days and had gone without sleep prior to the time of his arrest and questioning, (Tr. of Motion Hearing, pg. 12) then add to this the testimony of his ex-wife who testified at the hearing on motions that she is well acquainted with Mr. Poor's actions and abilities while in this drug induced stupefied condition, and her further testimony that it would be clear to any and all persons that when he is in such a drugged condition that it is obvious from his demeanor and speech and

his actions that he has no control of his narcotic induced thoughts (Tr. of defense motions hearing, pg. 42, line 19). It becomes clear that this is, without doubt, a case where the officers acted in reckless disregard to the truth in applying for the search warrant based solely on the drug induced ramblings of a speed freak.

The status of the law in Oklahoma then is one in which the Oklahoma court's attempt to analyze a trial court decision to determine whether a *Franks* violation has occurred will be tainted by the overly narrow application of *Aguilar* and *Spinelli* to the point where a defendant will never be able to bear its burden in establishing a reckless disregard for the truth by the affiant where a named criminal informant provides the information.

The factual situation presented in the case from which this petition arises can be stated as follows: Under the laws applied in the State of Oklahoma an officer could take the statements of an incompetent and senile person and use these statements to establish probable cause with no further burden being placed upon the officer to corroborate or verify the information. In Oklahoma an affidavit obtained in the preceding manner would be upheld under Oklahoma's application of *Aguilar, Spinelli* and *Franks*. The Oklahoma courts, by *Luker*, have eliminated any requirement upon the officer to inquire into the veracity of the informant, whether citizen or criminal, and have in this way eliminated the reckless disregard test of *Franks* from the Oklahoma courts. It is only where it can be shown that the officer actually knew the statements were false and is willing to admit that he possessed that

knowledge at the time the affidavit was filed that *Franks* will provide any protection in Oklahoma.

This distinction drawn by the Oklahoma courts is an artificial one in that the naming of an individual does not automatically indicate whether he is more or less credible than when he is unnamed. The test is whether or not the magistrate has been provided with information sufficient for him to determine that there is a probable cause to believe that evidence of a crime might be found at a particular place, and at a particular time. Credibility of any and all persons from whom information was obtained should therefore be of utmost concern to the magistrate; and until he is provided with some information on which he can base a determination of whether or not statements made by said criminal informant are true or that there is reason to believe he is telling the truth, this determintion of probable cause cannot be made. While an attack based on *Aguilar* and *Spinelli* is properly classified as a facial attack and a *Franks* hearing is a subfacial attack, this case presents to the court a question which is really both a facial and subfacial attack with the facial attack proving reckless disregard for the truth as required by a *Franks* subfacial attack on the search warrant.

Even assuming for the moment that the officer had no duty to provide information necessary for a determination of credibility by the magistrate, the circumstances under which the statement was taken and the drugged condition of the criminal informant, along with the mumbling and rambling inconsistencies in the taped statement taken by the officer, clearly demonstrates that the officer could

not rely upon the statements without doing so in reckless disregard for the truth in violation of the fourth amendment as established by *Franks*.

The record establishes that affidavit for the instant search warrant was obtained by a police officer-affiant upon information elicited from an untried informant, a chronic drug abuser, himself under arrest and facing criminal prosecution, who was *then and there stupefied with narcotic drugs*. STATEMENT OF FACTS, *supra*. So profound was this state of stupefication that the informant was later to have *no memory* of his interview with the officer. STATEMENT OF FACTS, *supra*. At hearing, when sober, the named informant denied the truth of all material allegations reflected in the warrant affidavit – allegations affiant-officer attributed to this witness, *allegations contradicted in part by the very tape interview which predicates them – allegations without which can be found no probable cause to support the instant warrant*. STATEMENT OF FACTS, *supra*. This testimony was corroborated by the former spouse who had seen informant earlier the same day and who *verified he was indeed under the influence of drugs*. STATEMENT OF FACTS, *supra*. Still, the most convincing and best evidence of informant's state of mind can be found in the tape recorded statement itself. This evidence clearly shows an *impaired mind*. Legal ramifications of such need not be solely confined to the context of *Franks v. Delaware* (*supra*), for *use of this type of evidence for any legal purpose "shocks the conscience"* of an ordered sense of liberty. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

So crucial to Anglo-American law is the concept of state of mind that perhaps this single feature best distinguishes it from any other. Diminished mental capacity voids a contract, annuls a marriage, negates specific criminal intent, invalidates a post-humus bequest, removes the ability to deal with one's own affairs, and ultimately, can lead to involuntary confinement in a free society. In sum, it cuts across the legal spectrum with effect to mitigate, vitiate, negate or void all it touches.

Testamentary capacity is generally considered the lowest threshold of legally recognized mental awareness. Hence Defendant would propose this simple test in evaluating the lawful weight to be attributed informant's affidavit statement: Who among us lawyers would allow a client in that condition to execute his will? Or, who among you of the bench would perform a wedding ceremony for him in such condition? Who of us even as laymen would enter into a contrct with James Poore, Jr. as he was on the evening of January 21, 1978, reflected by his speech in the recorded interview with the affiant-officer? *Yet, this state of awareness was State's basis for convicting Defendant.*

Clearly, this information – later recanted under oath – material to the finding of probable cause, was not "appropriately accepted" by the affiant-officer. Clearly, police utilization of the same was in "bad faith." Clearly, the warrant information (sworn in its source to be false) was secured "in reckless disregard of the truth" – indeed, *gross* disregard for truth. Clearly, Defendant made such a showing by a preponderance of the evidence. And clearly, even if the concept of *Franks v. Delaware,* (*supra*) were yet

to be born, "fundamental fairness" would abhor such abuse to fourth amendment ideals. Nevertheless, *Franks* (*supra*) is not the law and it speaks precisely to the instant situation.

How much clearer a case could be presented to this court than is presented by the facts of this case? Clearly, the officers' reliance on these statements of Mr. Poore, when made in a drug stupified state of mind, as evidenced by the tape recording of his interrogation can be said to be nothing less than reckless disregard for the truth if not representing total disregard for the truth.

Until such time as the Oklahoma courts are required to come into compliance with the United States Supreme Court decisions cited above, the citizens of the United States who are charged with crimes within the State of Oklahoma which involve search warrant questions will be denied the equal protection of the laws mandated by the fourteenth amendment and will have their fourth amendment rights severely restricted as compared to citizens charged of crimes in states following the proper rules of law laid down in *Aguilar, Spinelli* and *Franks*. This court should therefore grant certiorari to insure that the State of Oklahoma comes into compliance with *Aguilar, Spinelli* and *Franks* and provide for protection of fourth amendment rights as guaranteed by the United States Constitution.

II

The Court should grant certiorari to reconsider the limitations imposed by its decision rendered in

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), which removed the fourth amendment search and seizure questions from the habeas corpus jurisdiction of the lower federal courts thereby leaving the already overly crowded docket of the United States Supreme Court as the only federal forum for review of state court decisions in which the defendant asserts a claim of fourth amendment violations by the state police authorities.

This Court in *Stone v. Powell* struck a blow to the protections provided by the fourth amendment to the United States Constitution by almost totally eliminating the right of a defendant to have the Federal Court review a state court's ruling where it involves a question of search and seizure rising under the fourth amendment. This Court through its ruling has completely avoided the statutory protections so clearly spelled out by Congress at 28 U.S.C. §2254 which provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

To escape the language of this statute, the decision in *Stone v. Powell* reasoned that the Exclusionary Rule which the defendant sought to have reviewed by way of Writ of Certiorari is not a constitutional right, but a

judicially created remedy which does not fall within the protection provided by the Habeas Corpus Statute.

An examination of the case law surrounding the fourth amendment and the Exclusionary Rule as applied to the states reveals that this application developed to a large extent as a direct result of the inability of the states to safeguard the rights of its citizens as granted by the United States Constitution. *Wolf v. Colorado,* 338 U.S. 25, 93 L.Ed. 1782, 65 S.Ct. 1359 (1949) and *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, (19).

This Court's decision in *Powell* results in the unequal application of search and seizure constitutional rights from state to state by removing most state court decisions from review by the federal courts. As has been shown by the preceding section of this brief, the State of Oklahoma has consistently held to a belief that the mere naming of an informant, whether a citizen informant or a criminal informant is sufficient to meet the credibility requirements imposed by *Aguilar* and *Spinelli.* See *Luker v. State, supra.*

The *Stone* decision leaves in the mind of reader the feeling that the constitutional right to be free from unreasonable searches and seizures is one which is only important if the person whose right is violated is not guilty of the crime charged. The reader comes away with the impression that this Court is moving towards a view that if the end result of an illegal search is the obtaining of a conviction due to the illegally seized evidence admitted in court; that the ability to convict the defendant justifies the illegal search. This feeling arises due to the large amount of time

spent by the Court in *Powell* comparing the costs of the Exclusionary Rule and review of state court prosecution by Petition for Writ of Habeas Corpus for society against the benefit derived from discouragement of violations of fourth amendment rights occasioned by the Exclusionary Rule and Habeas Corpus Review. *Stone,* supra, at 488-494.

This is a drastic departure from the principles established that an illegal search cannot be justified by what the search uncovers which have, prior to this time, been followed by this court. *Byers v. United States,* 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927) and *Sibron v. New York,* 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

During the past, the state courts have shown little ability to anticipate the scope of Constitutional law in the area of search and seizure. The state courts have shown reluctance to apply the decisions of this Court beyond the limited facts of the particular decision many times causing a too narrow construction of its rules of law. For example, see *Luker v. State, supra, Wright v. State, supra,* and *Bishop v. State, supra,* all applying an overly narrow application of the *Aguilar* and *Spinelli* guidelines. It is in this area where Habeas Corpus jurisdiction can serve an invaluable service by providing a much more readily available forum for state defendants to insure that the state courts do not create so called factual distinctions between the United States Supreme Court decisions and those cases pending before them to a point where the factual distinctions and exceptions swallow the rule of law

laid down by the case.

Under the pre *Stone* Habeas Corpus review process, it is important to consider that the possibility of Federal review of state courts' decisions while perhaps, as suggested in *Stone* and numerous Law Review Articles (Habeas Corpus and Due Process, 17 Houston Law Review 923, Relitigation of Fourth Amendment claims under Section 1983; Federalism and the Illusory Right to a Federal forum, 3 Ill. Law for 783 (1980)) discussing the *Stone* decision, interfering with the principle of comity between federal and state courts has in reality played a large role in keeping the state courts in line with the United States constitutional mandates. The removal of the possibilities of the more easily obtained Habeas Corpus review in the area of search and seizure may have a drastic effect upon the manner in which search and seizure claims are treated by the courts and may have a detrimental effect on the Constitutional rights of state defendants. Unfortunately, there is no way to accurately determine the effect which the pre *Stone* possibility of Habeas Corpus review has had upon the State court decision or what the impact of the *Stone* decisions will be with regard to state litigated Constitutional rights.

Stone v. Powell, supra, leaves available only one possible check upon the state court system to insure that state courts follow the guidelines which have been established by the fourth amendment to the United States Constitution. The only means left to a state criminal defendant seeking review of the state courts' fourth amendment determination is by way of petitioning for Writ of Certiorari.

As this Court is well aware, the acceptance or denial of a Petition for Writ of Certiorari is left to your discretion. These petitions must many times give way to the manditory appeals which the court is required to hear on its overly crowded docket. This Court, in the exercise of its discretion to hear those Petitions for Certiorari that it has time to accept review, must carefully pick and choose those petitions which present especially troublesome areas of the law where there is confusion among the state or the federal jurisdiction regarding the application of Constitutional or Statutory law. Due to the limited room available for review on the Supreme Court Docket, many petitions having merit, but not perhaps being of great nationwide significance in the field of Constituional law, must be passed over without review by Federal Court. This results many times in the unequal application of the Constitutional law from state to state or on a case by case basis.

The equal application of the Federal Constitutional Law was the primary problem which the Habeas Corpus Jurisdiction of the federal courts was designed to promote. The very statement by Congress of what questions are reviewable by Habeas Corpus indicates that by its language, they intended to place the federal courts in a position of watchdog over the application of federal Constitutional rights by the state courts. The lower federal courts, although they are also crowded, are greater in number than the United States Supreme Court and more able to provide a quicker review of state court constitutional rulings.

These courts therefore played a large role in keeping

the decisions of the United States in line with United States constitutional guidelines.

The Court should grant Certiorari to reconsider the restrictions which were imposed by it through the *Stone* decision and reopen the lower federal courts to Habeas Corpus review of state court decisions to insure that the federal jurisdiction is placed in a position to oversee the state court determination of search and seizure questions and to provide to state defendants the opportunity for some minimal review by federal courts of state courts' rulings involving violations of fourth amendment rights. Only when this right to federal review is provided can the citizens of the different states be assured that due process and equal protection of the law will exist from state to state.

CONCLUSION

Petitioner prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

GARRISON, BROWN & CARLSON

By: Alan R. Carlson

Alan R. Carlson
530 S.E. Delaware
Bartlesville, Oklahoma 74005
Telephone: (918) 336-2520
Attorney for Petitioner

APPENDIX A

No. F-79-220

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
State of Oklahoma
MAR 17, 1981
ROSS N. LILLARD, JR.
Clerk

NOT FOR PUBLICATION

DAVID GUY BUTTRESS

Appellant

v.

THE STATE OF OKLAHOMA

Appellee

OPINION

BRETT, Presiding Judge:

The appellant, David Guy Buttress, was charged with Unlawful Possession of Marihuana with Intent to Distribute in violation of 63 O.S. 1971, §2-401(b-2), in the District Court of Washington County, Oklahoma, Case No. CRF-78-16. After waiving a jury trial, defendant was found guilty, and punishment set at four (4) years in the custody of the Department of Corrections with two (2) years of the sentence suspended.

Police officers armed with a search warrant entered the residence of the appellant on January 21, 1978. The

ensuing search revealed approximately one-hundred eighty-eight (188) pounds of marihuana—half that amount consisting of stems absent THC.

The appellant challenges the search warrant, alleging that the warrant affidavit contained false allegations material to the finding of probable cause from information obtained by an officer-affiant in reckless disregard of the truth.

The warrant affidavit was based on a taped conversation with a thirty-year-old informer who told police he had knowledge of marihuana and amphetamines at the residence of the appellant. The informer had been arrested for Driving Under the Influence of Drugs and had ingested a large quantity of amphetamines prior to the conversation with police. The search warrant affidavit was based on that conversation.

The appellant sought to go behind the face of the search warrant—a practice heretofore forbidden in this jurisdiction. *Brown v. State,* 565 P.2d 697 (Okl.Cr. 1977).[1]

As the lone dissenter to the absolute prohibition against subfacial challenges to a search warrant adopted by the Court in *Brown, supra,* it is with vigor that this author now delineate an exception to that rule.[2]

---

[1] After *Brown,* supra, was handed down, the Oklahoma Legislature provided for a limited challenge to the validity of a warrant where confidential informers were used. Laws 1977, c 265, §9 (approved 6-21-77, effective 10-1-77), first codified at 12 O.S. Supp. 1977, §418.9, now absorbed into the Evidence Code at 12 O.S. Supp. 1980, §2510.

[2] Dissenting in *Brown,* supra, Judge Brett termed an absolute ban on subfacial warrant challenges "a step toward the justice of the peace search warrant days."

In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the United States Supreme Court sounded the death knell for *Brown, supra*—if in light of the aforementioned Evidence Code exception any vitality remained. The Supreme Court upheld the presumption of validity concerning an affadavit supporting a search warrant, but found some situations which dictate an evidentiary hearing to challenge such affidavits.

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insuffient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficent, the defendant is entitled, under the Fourth Amendment, to his hearing. Whether he will

prevail at that hearing is, of coure, another issue.

In both *Franks* and the case at bar, the subfacial inquiry goes only to the integrity of the affiant's representations as to his own activities. The informant's veracity is not at issue. We do not provide for subfacial attack on anyone other than the affiant. We do not choose to expand the grounds for challenge of a search warrant in Oklahoma beyond that announced in the present case and the exceptions heretofore recognized by the Legislature at 12 O.S. Supp. 1980, §2510. We do not throw the doors wide open to allow subfacial warrant challenges of all types. In the case at bar, the appellant was granted a *Franks* hearing, but the trial court did not find that he established, by a preponderance of the evidence, deliberate falsehood or reckless disregard for the truth by the affiant. Although we endorse the principle announced in *Franks* that permits certain subfacial challenges to a search warrant, the facts in the case at bar are readily distinguishable.

In *Franks,* the affiant-officer based part of his warrant affidavit on conversations that never took place. Here, the officer-affiant did converse with the informer, in fact the conversation was tape recorded. The appellant nevertheless alleges that relying on the conversation of one who had ingested a large quantity of drugs is per se in reckless disregard of the truth. The informer testified that at the hearing he did not remember the taped conversation and therefore did not remember statements attributed to him in the affidavit. The informer's memory is not at issue. Not only did he make the statements attributed to

him in the affiant's affidavit, but those statements later proved to be accurate. The preponderance of the evidence establishes neither deliberate falsehoods nor reckless disregard for the truth by the officer-affiant. We find no merit in this proposition of error.

In his second proposition of error the appellant alleges that the State failed to establish the presence of tetrahydrocannabinol (THC) in the marihuana, as mandated by statute. The State chemist testified that he performed a Duquenois-Levine test and a thin layer chromatography test, both tests commonly used to determine the presence of THC. Although the chemist did not state directly that THC was present in the substance tested, he did report to the court that both tests were positive and the substance was cannabis sativa L, commonly called marihuana. This testimony sufficiently establishes the presence of THC because if THC is not present, as the chemist testified, he would report negative for marihuana. See *Winters v. State,* 545 P.2d 786 (Okl.Cr. 1976). We find no merit in this proposition of error.

In his third proposition of error the appellant contends that it was reversible error to admit into evidence handguns found in plain view during the search of his house on the night in question. The guns were found in plain view during a search pursuant to a warrant. The appellant claims error in that at a motion in limine hearing the trial court limited the handguns which were to be admitted to a derringer, but at trial several guns were admitted into evidence. The admission of the handguns, which were loaded when found, is not evidence of other

crimes under *Burks v. State,* 594 P.2d 771 (Okl.Cr. 1979). Despite the motion in limine, which was denied with an unclear exception regarding the handguns, the trial court permitted handguns other than the derringer to be introduced, finding that they were relevant, and that their probative value outweighed the prejudice to the defendant. As the trial court pointed out, there was no implication that possession of the handguns was against the law. We find no merit in this proposition of error.

In his last assignment of error, the appellant alleges that the search warrant was insufficient on its face to support a nighttime search. We disagree. As per 22 O.S. Supp. 1980, §1230, the trial judge having found that the affidavit stated positively that the property was in the place to be searched, and that there was a likelihood that the property named in the search warrant would be destroyed, moved or concealed, directed that the warrant be served at any time of the day or night. We find no merit in this proposition of error. Judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT
OF WASHINGTON COUNTY, OKLAHOMA
THE HONORABLE CHLOE PASSLEY, JUDGE

DAVID GUY BUTTRESS, appellant, was convicted of Unlawful Possession of Marihuana with Intent to Distribute in Washington County Case No. CRF-78-16;

was sentenced to four (4) years' imprisonment with two (2) years suspended, and appeals. AFFIRMED.

REBECCA L. ADAMS,
SAND SPRINGS, OKLAHOMA,
Attorney for Appellant.

JAN ERIC CARTWRIGHT,
Attorney General,

TIMOTHY S. FRETS,
Assistant Attorney General,

STATE OF OKLAHOMA,
Attorneys for Appellee.

OPINION BY BRETT, P. J.
BUSSEY, J., CONCURS IN RESULTS
CORNISH, J., CONCURS IN RESULTS

APPENDIX B

No. F-79-220

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
State of Oklahoma
JUL 17, 1981
ROSS N. LILLARD, JR.
Clerk

DAVID GUY BUTTRESS
Petitioner

v.

THE STATE OF OKLAHOMA
Respondent

ORDER DENYING PETITION FOR REHEARING AND ISSUING MANDATE

On March 16, 1981, this Court filed its opinion in the above styled and numbered appeal affirming appellant's conviction for Possession of Marijuana with Intent to Distribute. On April 1, 1981, the petition for rehearing was filed and permission was granted to file a brief in support of the petition. On April 27, 1981, counsel for appellant filed an extensive brief in support of the petition for rehearing, and request for oral argument was also made.

NOW THEREFORE, after providing due consideration to the petition for rehearing and the supporting brief,

and being fully advised in the premises, this Court finds that the oral argument should be denied and that the petition for rehearing should be denied.

IT IS THEREFORE THE ORDER OF THIS COURT, that oral argument is denied and the petition for rehearing filed in the above styled and numbered appeal shall be denied; and it is ordered that the mandate shall issue forthwith.

WITNESS OUR SIGNATURES AND THE SEAL OF THIS COURT, this 17th day of July, 1981.

S/S Tom Brett
TOM BRETT, PRESIDING JUDGE

S/S Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:

S/S Ross N. Lillard, Jr.
Clerk

APPENDIX C

IN THE DISTRICT COURT
OF WASHINGTON COUNTY
STATE OF OKLAHOMA

MISCL. NO. 78-2_____

STATE OF OKLAHOMA

ss.

COUNTY OF WASHINGTON

AFFIDAVIT FOR SEARCH WARRANT

Detective James R. Winn, Affiant, being first duly sworn, on oath deposes and says that the following property constitutes evidence of the commission of a crime:

Marijuana and amphetamines

and that the above mentioned property is now located as follows:

> in a single-story white frame house, with front door facing east located at 1905 S. Sante Fe Street, said house being the second residential building on the west side of the street south of the intersecion of 19th and Sante Fe streets

in the City of Bartlesville Washington County, State of Oklahoma.

based upon the following facts:

1. That I am a Detective with the City of Bartlesville, Oklahoma.

2. That I had occasion to interview on January 21, 1978, one James Ray Poore, Jr., who had been arrested for offenses of Driving under the Influence of Drugs, and Possession of a Controlled Dangerous Drug earlier on the same date by Officer Joe A. White.

3. That Mr. Poore informed me that he had been handed the baggie containing amphetamines found in his possession on January 21, 1978, from David Buttress in order to transport same to Michael Shrum. Mr. Poore further informed me that Buttress had given him the baggie of amphetamines at Mr. Buttress' residence at 1905 S. Sante Fe in the City of Bartlesville, Oklahoma at approximately 4:00 p.m. on January 21, 1978.

4. That Poore took me to the place where Buttress had given him the baggie and pointed out the residence to me. Said residence was a single story, white frame house, with front door facing east located at 1905 S. Sante Fe Street, said house being the second residential building on the west side of the street south of the intersection of 19th and Sante Fe streets, in the City of Bartlesville, Washington County, state of Oklahoma.

5. That Poore further informed me that Buttress on January 18, 1978 in the presence of Mr. Poore, had given Mr. Poore marijuana. Mr. Poore further stated to me that on that date he overheard a telephone conversation in which Buttress stated that he had "100 lot" quantities of amphetamines for sale. Mr. Poore also observed a quantity of marijuana lying on a card

table, all of the above-described incidents taking place at the residence of Mr. Buttress, 1905 S. Sante Fe.

S/S James R. Winn
Affiant

Subscribed and sworn to before me this 21st day of January, 1978

Judge of the District Court
Washington County, Oklahoma

IN THE DISTRICT COURT
OF WASHINGTON COUNTY
STATE OF OKLAHOMA

MISCL. NO. 78-2_____
CRF-78-16

STATE OF OKLAHOMA

ss.

COUNTY OF WASHINGTON

SEARCH WARRANT

IN THE NAME OF THE STATE OF OKLAHOMA,

TO: ANY SHERIFF, POLICEMAN OR LAW ENFORCEMENT OFFICER IN WASHINGTON COUNTY, STATE OF OKLAHOMA.

Affidavit having been sworn to by the Affiant(s), Detective James R. Winn, before me this day, based upon the facts stated therein, probable cause having been found, I command you at any time of the day or night to make immediate search of the following described property and things, and if you find the same or any part thereof to bring it forthwith before me at my office at Bartlesville, Oklahoma:

Marijuana and amphetamines

together with other related fruits, instrumentalities and evidence of the crime

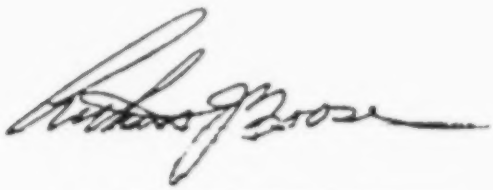
Said search to be conducted at the following described location:

in a single-story white frame house, with front door facing

east located at 1905 S. Sante Fe street, said house being the second residential building on the west side of the street south of the intersection of 19th and Sante Fe Streets

in the City of Bartlesville, Washington County, Oklahoma.

Issued under my hand this 21st day of January, 1978.



Judge of the District Court
Washington County, Oklahoma

Opposition

Office - Supreme Court, U.S.
FILED
OCT 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-550

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID GUY BUTTRESS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

ROBERT A. NANCE
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Respondent

October, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Whether a search warrant affidavit based upon the tip of a named informant establishes probable cause for a search where the affidavit is drafted within hours of the arrest of the informant for possession of amphetamines, where the informant tells officers where he got the illicit drugs that day for delivery to another person, where the informant takes officers to the location and confirms the address he had given earlier and where the informant reports seeing other illicit drugs within the last three days and further overhearing the defendant discussing the sale of "100 lot" quantities of amphetamines at that address.

2. Whether the petitioner (defendant below) proved by a preponderance of the evidence that the search warrant affiant acted in reckless disregard of the truth in drafting the warrant affidavit.

3. Whether this Court should reverse *Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), in this non-habeas corpus case.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	4
I. Both the Face of the Warrant Affidavit and the Underlying Facts Justified Issuance of the Warrant	4
A. The Warrant Affidavit was adequate under *Aguilar* and *Spinelli*	4
B. The defendant failed to show by a preponderance of the evidence that affiant recklessly disregarded the truth in seeking the search warrant	6
II. The Court Should Not Use This Case as a Vehicle to reconsider *Stone* v. *Powell*	9
III. This Case Presents No Questions Important Enough to Justify Granting Certiorari	9
CONCLUSION	10
APPENDIX A: Affidavit for Search Warrant (Defendant's Exh. 6)	1a
APPENDIX B: Opinion of Oklahoma Court of Criminal Appeals (unreported), filed March 17, 1981	1b

TABLE OF AUTHORITIES

Cases PAGE(S)

Aguilar v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) 4

Franks v. *Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) 4, 6-7, 8

Spinelli v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) 4, 5, 6

Stone v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) 9, 10

United States v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971) 6

Youakim v. *Miller*, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed. 2d 701 (1976) 9

U. S. Constitution

Amendment IV 2, 9

Amendment XIV 2

Statutes

28 U.S.C. § 1257(3) 2

28 U.S.C. § 2254 2

No. 81-550

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID GUY BUTTRESS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Opinion of the Oklahoma Court of Criminal Appeals entered on March 16, 1981, and filed on March 17, 1981.

OPINION BELOW

The opinion below is unreported, but is incorporated herein as Appendix B.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on March 16, 1981. A petition for rehearing was denied on July 17, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Petitioner also desires the Court to interpret 28 U.S.C. § 2254, which states in part:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

The petitioner (hereinafter defendant) was convicted of possession of marijuana with intent to distribute in the District Court of Washington County, Oklahoma, on October 25, 1978. Defendant's conviction was based upon a large quantity of marijuana found by police officers in a search made with benefit of a search warrant issued on January 21, 1978.

A copy of the affidavit used to secure the search warrant is incorporated herein as Appendix A. It recites the fact that one James Ray Poore, Jr. (hereinafter Poore), was arrested on January 21, 1981, for driving under the influence of drugs and possession of amphetamines. After his arrest, Poore told police officers that the defendant had given him the amphetamines to deliver to one Michael Shrum at about 4:00 p.m. that afternoon. The defendant gave Poore these drugs at 1905 S. Santa Fe in Bartlesville, Oklahoma, where the defendant lived. Poore further told officers that three days earlier he had seen marijuana at the defendant's residence and heard the defendant discussing the availability for sale of "100 lot" quantities of amphetamines. Based upon this affidavit, a search warrant for amphetamines and marijuana was issued.

The defendant moved to quash the warrant and suppress the seized marijuana in the trial court. These motions were denied. After a non-jury trial the defendant was convicted. The Oklahoma Court of Criminal Appeals affirmed the conviction. A copy of that Court's Opinion is attached hereto as Appendix B. The defendant now seeks a Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeals.

REASONS FOR DENYING THE WRIT

I. BOTH THE FACE OF THE WARRANT AFFIDAVIT AND THE UNDERLYING FACTS JUSTIFIED ISSUANCE OF THE WARRANT.

The Petition for Writ of Certiorari attacks the search warrant on two levels. First, the defendant complains that the face of the supporting affidavit was inadequate to allow a magistrate to find probable cause under the terms of *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Second, the defendant alleges that the police officer who drafted the affidavit did so in reckless disregard of the truth within the meaning of *Franks* v. *Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978). Respondent (hereinafter the State of Oklahoma) contends the affidavit was fully adequate in all respects.

A. The Warrant Affidavit was Adequate Under *Aguilar* and *Spinelli*.

The defendant complains that the affidavit used to secure the search warrant was inadequate to establish probable cause. Where police officers seek a search warrant based upon information provided by an informant, the issuing magistrate must be told some of the underlying circumstances from which the informant concluded drugs were present and some of the underlying circumstances which lead the police to believe that the informant is reliable. *Aguilar* v. *Texas*, 378 U.S. 108, 114-15, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723, 729 (1964). The police may use an informant's tip to secure a warrant if independent police

investigation corroborates the tip enough to indicate the informant is credible. *Spinelli* v. *United States*, 393 U.S. 410, 417-18, 89 S.Ct. 584, 589-90, 21 L.Ed.2d 637, 644 (1969). The affidavit in the present case passes muster under these standards.

The affidavit named the informant and stated that he had been arrested with amphetamines the same day (Appendix A hereto). The informant, Poore, told officers that the defendant gave him the drugs at the defendant's residence, 1905 S. Santa Fe, to deliver to a third party around 4:00 p.m. that same day. *Id.* Officers took Poore to the house where defendant had the drugs and confirmed the address Poore had given them at the station. *Id.* Poore went on to tell the police that the defendant had given him marijuana at the same address three days earlier and further that the defendant had discussed having "100 lot" quanties of amphetamines for sale in a phone discussion. *Id.*

Poore's tip was believable because the police named their source to the magistrate. Further, Poore had physical evidence — a baggie of amphetamines given him by the defendant — to corroborate his story. In addition, Poore's account was first-hand, not based upon rumor, gossip or speculation. Poore provided the address and took officers to the house where the drugs were found and confirmed the same address.

If this information alone was not sufficient, the magistrate could have considered the fact that Poore's tip was against his own penal interest. Poore's story implicated him in the possession and distribution of illicit drugs. No one would be likely to make such admissions unless they were

true. See *United States* v. *Harris*, 403 U.S. 573, 583-85, 91 S.Ct. 2075, 2082-83, 29 L.Ed.2d 723, 733-34 (1971) (magistrate may consider credibility of admissions against interest. Opinion by C.J. Burger, joined by J.J. White, Black, and Blackmun; *contra.*, J.J. Harlan, Douglas, Brennan and Marshall.).

The affidavit at issue meets the *Aguilar* test. It indicates personal knowledge and complicity of the named informant in drug dealings. *Spinelli* permits use of corroboration of the location and by the actual seizure of drugs from Poore. Further, Poore's statements against his own penal interest lend additional credibility to the affidavit. An affidavit need only show the probability, not a prima facie showing, of criminal activity. *Spinelli* v. *United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637, 645 (1969). The affidavit herein met that standard.

B. The Defendant Failed to Show By a Preponderance of the Evidence that Affiant Recklessly Disregarded the Truth in Seeking the Search Warrant.

The defendant argued that the affiant recklessly disregarded the truth in seeking the search warrant in a hearing on a motion to quash on October 11, 1978. Transcript page references below are to the transcript of that hearing. The trial court ruled that the defendant failed to show the elements of *Franks* v. *Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (Tr. 55). The Oklahoma Court of Criminal Appeals agreed, using this language:

> "... In the case at bar, the appellant was granted a *Franks* hearing, but the trial court did not find that

> he established, by a preponderance of the evidence, deliberate falsehood or reckless disregard for the truth by the affiant. Although we endorse the principle announced in *Franks* that permits certain subfacial challenges to a search warrant, the facts in the case at bar are readily distinguishable." (Unpublished Opinion, Appendix B hereto.)

The State submits that the defendant did fail to show by a preponderance of the evidence that the affiant perjured himself or acted with reckless disregard for the truth as required by *Franks* v. *Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667, 672 (1978).

Poore testified on the defendant's behalf at the October 11, 1978, hearing and attempted to deny some of the facts set out in the affidavit. However, a close examination of Poore's testimony shows that when on the witness stand he did not remember what he had told officers at the time, nor did he even remember that the police taped his statement.

Poore testified that he had "no knowledge" of contact with the defendant on January 21, 1978, the day in question (Tr. 11, lns. 12-16). In fact, Poore did not recall anything from shortly after his arrest on Saturday, January 21, 1978, until sometime Sunday evening (Tr. 13, lns. 10-12). He had "no knowledge" of the truth of taking police to the defendant's residence as set out in the affidavit (Tr. 15, lns. 6-8). Poore again testified that he did not remember what happened after arriving at the police station (Tr. 16, lns. 5-15). He did admit to smoking marijuana with the defendant three days earlier on January 18, 1978, substantially confirming one part of the affidavit

(Tr. 17, lns. 16-18; Tr. 18, lns. 17-25). Poore had "no knowledge" of the conversation about selling "100 lot" quantities of amphetamines, but denied the conversation took place (Tr. 18, lns. 3-15). Poore did not remember giving a taped statement to the District Attorney and police officers (Tr. 21-23). His memory "vagues off" about twenty minutes after his arrest (Tr. 23, lns. 3-20). In fact, Poore did not remember any conversation with any police officer on January 21, 1978 (Tr. 27, lns. 12-16). The Assistant District Attorney produced the tape of Poore's conversation and played it at the hearing (Tr. 50, lns. 22-25). The tape was made part of the record, but was not transcribed (Tr. 51, ln. 21). After hearing the tape and Poore's testimony, the trial court ruled that Poore made the statements in question supporting the affidavit, but that he could not recall later what he had said (Tr. 55). The defendant's purported evidence of the falsity of the affidavit amounted to nothing more than Poore's inability afterward to recall what he had told the police.

The defendant presented no evidence that Detective Winn, the affiant, *himself* lied or recklessly disregarded the truth. If anything, Poore impeached himself. However, impeachment for this purpose only goes to the affiant, not a non-governmental informant. *Franks* v. *Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667, 682 (1978). Thus, both the trial court and the Oklahoma Court of Criminal Appeals were correct in their rulings that the defendant failed to show by a preponderance of the evidence that the affiant violated the rule of *Franks* v. *Delaware*.

II. THE COURT SHOULD NOT USE THIS CASE AS A VEHICLE TO RECONSIDER *STONE* v. *POWELL.*

This is not a habeas corpus case; the defendant has not even sought that writ. However, the defendant asks the Court to reconsider *Stone* v. *Powell,* 428 U.S. 465, 96 S.Ct. 303, 49 L.Ed.2d 1067 (1976), because state courts allegedly interpret the Fourth Amendment too narrowly. The State of Oklahoma cannot see how the defendant's position would be affected by the reversal of *Stone* since the defendant has not applied for a writ of habeas corpus. Nor can the State see that the defendant offers any meritorious reason for so drastically altering established habeas corpus law. While the Court can decide questions not raised below, it does so only in exceptional cases. *Youakim* v. *Miller,* 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701, 705 (1976). The defendant has presented no exceptional justification for rewriting federal habeas corpus law while requesting certiorari to the Oklahoma Court of Criminal Appeals. Should the Court choose to reconsider *Stone,* the State of Oklahoma asks an opportunity to file a brief supporting existing law.

III. THIS CASE PRESENTS NO QUESTION IMPORTANT ENOUGH TO JUSTIFY GRANTING CERTIORARI.

While this Court's Rule 17 is, by its own terms, not exclusive in setting out grounds for exercise of the Court's discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court seeks to consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any state. Nor does the Court need to exercise its super-

visory powers herein. The defendant alleges no great dispute between the highest courts of any state on any substantial federal question. No federal question requiring the attention of this Court is urged. The courts below have acted consistently with decisions of this Court but found the facts contrary to defendant's position. This case simply does not merit expenditure of the Court's scarce resources. Certiorari should not be granted.

CONCLUSION

The instant case presents no major issue justifying review by this Court. Nor is the record adequate to merit reconsideration of *Stone* v. *Powell*. The courts below correctly found both the face and underlying facts supporting the warrant affidavit adequate to establish probable cause. The State of Oklahoma respectfully requests the Court to deny issuance of the writ of certiorari.

Respectfully submitted,

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

ROBERT A. NANCE
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Respondent

October, 1981

APPENDICES

APPENDIX A

DEFENDANT'S EXHIBIT 6

[Filed March 30, 1978]

STATE OF OKLAHOMA)
) ss. MISCL. NO. 78-2
COUNTY OF WASHINGTON)

AFFIDAVIT FOR SEARCH WARRANT

Detective James R. Winn, Affiant, being first duly sworn, on oath deposes and says that the following property constitutes evidence of the commission of a crime:

Marijuana and amphetamines

and that the above mentioned property is now located as follows:

in a single-story white frame house, with front door facing east located at 1905 S. Santa Fe Street, said house being the second residential building on the west side of the street south of the intersection of 19th and Santa Fe streets

in the City of Bartlesville, Washington County, State of Oklahoma.

based upon the following facts:

1. That I am a Detective with the City of Bartlesville, Oklahoma.
2. That I had occasion to interview on January 21, 1978, one James Ray Poore, Jr., who had been arrested for the offenses of Driving under the Influence of Drugs, and Possession of a Controlled Dangerous Drug earlier on the same date by Officer Joe A. White.
3. That Mr. Poore informed me that he had been handed the baggie containing amphetamines found in his possession on January 21, 1978, from David Buttress in order to transport same to Michael Shrum. Mr. Poore

further informed me that Buttress had given him the baggie of amphetamines at Mr. Buttress' residence at 1905 S. Santa Fe in the City of Bartlesville, Oklahoma at approximately 4:00 p.m. on January 21, 1978.

4. That Poore took me to the place where Buttress had given him the baggie and pointed out the residence to me. Said residence was a single story, white frame house, with front door facing east located at 1905 S. Santa Fe Street, said house being the second residential building on the west side of the street south of the intersection of 19th and Santa Fe streets, in the City of Bartlesville, Washington County, state of Oklahoma.

5. That Poore further informed me that Buttress on January 18, 1978, in the presence of Mr. Poore, had given Mr. Poore marijuana. Mr. Poore further stated to me that on that date he overheard a telephone conversation in which Buttress stated that he had "100 lot" quantities of amphetamines for sale. Mr. Poore also observed a quantity of marijuana lying on a card table, all of the above-described incidents taking place at the residence of Mr. Buttress, 1905 S. Santa Fe.

(s) *James R. Winn*
Affiant

Subscribed and sworn to before me this *21st* day of *January*, 1978.

(s) *Arthur J. Boose*
Judge of the District Court
Washington County, Oklahoma

APPENDIX B

[Filed March 17, 1981]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAVID GUY BUTTRESS, Appellant,	)	
-vs-	)	No. F-79-220
THE STATE OF OKLAHOMA, Appellee.	)	

-OPINION-

BRETT, Presiding Judge:

The appellant, David Guy Buttress, was charged with Unlawful Possession of Marihuana with Intent to Distribute in violate of 63 O.S.1971, § 2-401(b-2), in the District Court of Washington County, Oklahoma, Case No. CRF-78-16. After waiving a jury trial, defendant was found guilty, and punishment set at four (4) years in the custody of the Department of Corrections with two (2) years of the sentence suspended.

Police officers armed with a search warrant entered the residence of the appellant on January 21, 1978. The ensuing search revealed approximately one-hundred eighty-eight (188) pounds of marihuana — half that amount consisting of stems absent THC.

The appellant challenges the search warrant, alleging that the warrant affidavit contained false allegations material to the finding of probable cause from information obtained by an officer-affiant in reckless disregard of the truth.

The warrant affidavit was based on a taped conversation with a thirty-year-old informer who told police he had knowledge of marihuana and amphetamines at the resi-

dence of the appellant. The informer had been arrested for Driving Under the Influence of Drugs and had ingested a large quantity of amphetamines prior to the conversation with police. The search warrant affidavit was based on that conversation.

The appellant sought to go behind the face of the search warrant — a practice heretofore forbidden in this jurisdiction. *Brown* v. *State*, 565 P.2d 697 (Okl.Cr.1977).[1]

As the lone dissenter to the absolute prohibition against subfacial challenges to a search warrant adopted by the Court in *Brown*, supra, it is with vigor that this author now delineate an exception to that rule.[2]

In *Franks* v. *Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the United States Supreme Court sounded the death knell for *Brown*, supra — if in light of the aforementioned Evidence Code exception any vitality remained. The Supreme Court upheld the presumption of validity concerning an affidavit supporting a search warrant, but found some situations which dictate an evidentiary hearing to challenge such affidavits.

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.

---

[1] After *Brown*, supra, was handed down, the Oklahoma Legislature provided for a limited challenge to the validity of a warrant where confidential informers were used. Laws 1977, c. 265, § 9 (approved 6-21-77, effective 10-1-77), first codified at 12 O.S. Supp.1977, § 418.9, now absorbed into the Evidence Code at 12 O.S. Supp.1980, § 2510.

[2] Dissenting in *Brown*, supra, Judge Brett termed an absolute ban on subfacial warrant challenges "a step toward the justice of the peace search warrant days."

> They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

In both *Franks* and the case at bar, the subfacial inquiry goes only to the integrity of the affiant's representations as to his own activities. The informant's veracity is not at issue. We do not provide for subfacial attack on anyone other than the affiant. We do not choose to expand the grounds for challenge of a search warrant in Oklahoma beyond that announced in the present case and the exceptions heretofore recognized by the Legislature at 12 O.S. Supp.1980, § 2510. We do not throw the doors wide open to allow subfacial warrant challenges of all types. In the case at bar, the appellant was granted a *Franks* hearing, but the trial court did not find that he established, by a preponderance of the evidence, deliberate falsehood or reckless disregard for the truth by the affiant. Although we endorse the principle announced in *Franks* that permits certain subfacial challenges to a search warrant, the facts in the case at bar are readily distinguishable.

[APPENDIX]

In *Franks*, the affiant-officer based part of his warrant affidavit on conversations that never took place. Here, the officer-affiant did converse with the informer, in fact the conversation was tape recorded. The appellant nevertheless alleges that relying on the conversation of one who had ingested a large quantity of drugs is per se in reckless disregard of the truth. The informer testified that at the hearing he did not remember the taped conversation and therefore did not remember statements attributed to him in the affidavit. The informer's memory is not at issue. Not only did he make the statements attributed to him in the affiant's affidavit, but those statements later proved to be accurate. The preponderance of the evidence establishes neither deliberate falsehoods nor reckless disregard for the truth by the officer-affiant. We find no merit in this proposition of error.

In his second proposition of error the appellant alleges that the State failed to establish the presence of tetrahydrocannabinol (THC) in the marihuana, as mandated by statute. The State chemist testified that he performed a Duquenois-Levine test and a thin layer chromatography test, both tests commonly used to determine the presence of THC. Although the chemist did not state directly that THC was present in the substance tested, he did report to the court that both tests were positive and the substance was cannabis sativa L, commonly called marihuana. This testimony sufficiently establishes the presence of THC because if THC is not present, as the chemist testified, he would report negative for marihuana. See *Winters* v. *State*, 545 P.2d 786 (Okl.Cr.1976). We find no merit in this proposition of error.

In his third proposition of error the appellant contends that it was reversible error to admit into evidence handguns found in plain view during the search of his house on the night in question. The guns were found in plain view during a search pursuant to a warrant. The appellant claims error in that at a motion in limine hearing the trial

court limited the handguns which were to be admitted to a derringer, but at trial several guns were admitted into evidence. The admission of the handguns, which were loaded when found, is not evidence of other crimes under *Burks* v. *State*, 594 P.2d 771 (Okl.Cr.1979). Despite the motion in limine, which was denied with an unclear exception regarding the handguns, the trial court permitted handguns other than the derringer to be introduced, finding that they were relevant, and that their probative value outweighed the prejudice to the defendant. As the trial court pointed out, there was no implication that possession of the handguns was against the law. We find no merit in this proposition of error.

In his last assignment of error, the appellant alleges that the search warrant was insufficient on its face to support a nighttime search. We disagree. As per 22 O.S.Supp. 1980, § 1230, the trial judge having found that the affidavit stated positively that the property was in the place to be searched, and that there was a likelihood that the property named in the search warrant would be destroyed, moved or concealed, directed that the warrant be served at any time of the day or night. We find no merit in this proposition of error. Judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF
WASHINGTON COUNTY, OKLAHOMA
THE HONORABLE CHLOE PASSLEY, JUDGE

DAVID GUY BUTTRESS, appellant, was convicted of Unlawful Possession of Marihuana with Intent to Distribute in Washington County Case No. CRF-78-16; was sentenced to four (4) years' imprisonment with two (2) years suspended, and appeals. AFFIRMED.

REBECCA L. ADAMS,
SAND SPRINGS, OKLAHOMA,
Attorney for Appellant

[APPENDIX]

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL
TIMOTHY S. FRETS,
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
Attorneys for Appellee.

OPINION BY BRETT, P.J.
BUSSEY, J., CONCURS IN RESULTS
CORNISH, J., CONCURS IN RESULTS